IN THE SUPREME COURT OF THE STATE OF NEVADA

FEDERAL NATIONAL MORTGAGE ASSOCIATION; AND GRANDBRIDGE REAL ESTATE CAPITAL, LLC, Appellants, vs. WESTLAND LIBERTY VILLAGE, LLC, A NEVADA LIMITED LIABILITY COMPANY; AND WESTLAND VILLAGE SQUARE, LLC, A NEVADA LIMITED LIABILITY COMPANY, Respondents.	**Supreme Court No. 82174** Eighth Judicial District Court Case No. A-20-819412-B

APPEAL
From Eighth Judicial District Court, State of Nevada, County of Clark
The Honorable Kerry Earley / The Honorable Mark Denton[1]

APPELLANT'S OPENING BRIEF

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[1] The order being appealed was entered by Judge Kerry Earley before the case was transferred to business court.

RULE 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities described in Nevada Rule of Appellate Procedure ("NRAP") 26.1(a) and must be disclosed. These representations are made in order that the justices of this Court may evaluate possible disqualification or recusal.

Appellant Grandbridge Real Estate Capital, LLC ("Grandbridge") is a wholly owned subsidiary of Truist Bank.

Grandbridge had not yet made an appearance in the proceedings below at the time that the injunction order that is the subject of this appeal was entered. In the subsequent proceedings below, Grandbridge was represented by Joseph G. Went, Esq., Lars K. Evensen, Esq. and Sydney R. Gambee, Esq. and the law firm of Holland & Hart LLP.

DATED this 22nd day of June 2021.

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I. JURISDICTIONAL STATEMENT

This is an appeal from an order granting a preliminary injunction. On November 24, 2020, the district court entered its *Order Granting Defendants' Motion for Preliminary Injunction and Denying Application for Appointment of Receiver* (the "Order"). APP 1569 – 1584. On December 4, 2020, Grandbridge timely filed its *Notice of Appeal* herein pursuant to NRAP 3A(b)(3) and NRAP 4. APP 1588 – 1590. The Nevada Supreme Court has appellate jurisdiction pursuant to NRAP 3A(b)(3), Article 6, Section 4 of the Constitution of the State of Nevada and NRS 2.090(2).

II. SUPREME COURT ROUTING STATEMENT

The Nevada Supreme Court should retain this appeal despite the presumptive assignment of this matter to the Court of Appeals pursuant to NRAP 17(b)(12). On October 19, 2020, prior to the issuance of the Order, Grandbridge filed its *Request for Assignment to Business Court*. On October 22, 2020, this case was transferred to business court. The Order was entered after the case was transferred to business court. The Nevada Supreme Court's retention of jurisdiction is appropriate under NRAP 17(a)(9).

III. STATEMENT OF THE ISSUES

1. Did the district court err when it entered the Order against Grandbridge when Grandbridge had not been served with *Opposition to Plaintiff's Application*

for Appointment of Receiver on Order Shortening Time; Counter-Motion for Temporary Restraining Order and/or Preliminary Injunction; Memorandum of Points and Authorities (the "Countermotion") and the *Reply in Support of Counter-Motion for Temporary Restraining Order and/or Preliminary Injunction* (the "Reply") filed herein by Respondents Westland Village Square, LLC ("Village Square") and Westland Liberty Village LLC ("Liberty Village") (together with Village Square, "Westland" or "Respondents"), thereby depriving Grandbridge of notice and an opportunity to be heard?

2. Did the district court err when it entered the Order which contains provisions that are mandatory in nature and exceed the scope of the relief sought in the Countermotion?

IV. STATEMENT OF THE CASE

An injunction was wrongfully entered against Grandbridge. It now brings this appeal before the Court to obtain relief from the injunction that should not have been entered against it without evidence of service and notice. The district court improperly entered the Order without affording Grandbridge, a named defendant and specifically enjoined party, an opportunity to be heard on the issues. This appeal has been filed before this Court to modify the Order that is overbroad and excessive, and which employs mandatory provisions that compel Grandbridge to take certain action on an ongoing basis into the indefinite future.

On August 12, 2020, Appellant Federal National Mortgage Company, a federally chartered corporation ("Fannie Mae"), filed a complaint against Westland and a motion seeking the appointment of a receiver on an order shortening time (the "Motion"). APP 1 - 13. On August 31, 2020, Westland filed an answer, counterclaim and third-party complaint ("Answer, Counterclaim, and Third-Party Complaint") that named Grandbridge as a third-party defendant. On that same day, Westland filed an opposition to Fannie Mae's Motion as well as a countermotion (the "Countermotion") for injunctive relief seeking to stop foreclosure proceedings underway with certain real property Westland owns. APP 1291 - 1325.

Grandbridge was served with Westland's Answer, Counterclaim, and Third-Party Complaint on September 15, 2020. APP 1449 – 1454. Grandbridge was not served with Westland's Countermotion that resulted in the entry of the Order, or the reply that Westland filed in support of the Countermotion.

On October 13, 2020, the district court held a hearing on the competing motions filed by Fannie Mae and Westland. APP 1445 - 1507. By this date, Grandbridge had not yet filed its responsive pleading to the Answer, Counterclaim, and Third-Party Complaint. The district court judge ruled from the bench, pronouncing her ruling denying Fannie Mae's Motion and granting Westland's Countermotion to enjoin further foreclosure proceedings.

On October 19, 2020, Grandbridge filed its answer to Westland's third-party complaint. APP 1508 – 1555. On October 22, 2020, pursuant to Grandbridge's request, this case was transferred to business court and a new department was assigned.

The district court adopted the proposed order submitted by Westland. It includes provisions specifically enjoining Grandbridge, provisions that exceed the district court's ruling announced at the October 13, 2020 hearing, and specific relief not sought in the Motion or Countermotion.

Grandbridge now appeals the entry of the Order, challenging that the district court should not have entered an injunction against Grandbridge without evidence of service, notice or an opportunity to be heard. Moreover, the Order should be modified to remove the many mandatory provisions directed to specific activity required from Grandbridge.

V. STATEMENT OF FACTS

A. The Village Square Loan.

1. On November 2, 2017, Respondent Westland Village Square, LLC's ("Village Square") predecessor-in-interest, Shamrock Properties VII LLC, a Delaware limited liability company ("Shamrock VII"), and SunTrust Bank, a Georgia banking corporation ("SunTrust"), executed a *Multifamily Loan and Security Agreement* ("Village Square Loan Agreement") setting forth the terms and

obligations of the parties with respect to a loan in the amount of $9,366,00.00. APP 17 – 158.

2. On November 2, 2017, Shamrock VII executed a *Multifamily Note* ("Village Square Note") in favor of SunTrust in the original principal amount of $9,366,000.00, together with interest as detailed therein. APP 160 – 165.

3. On November 2, 2017, Shamrock VII entered into a *Multifamily Deed of Trust, Assignment of Leases and Rents, Security Agreement and Fixture Filing* ("Village Square Deed of Trust," together with Village Square Loan Agreement and Village Square Note, the "Village Square Loan Documents") to secure, among other things, repayment of the indebtedness under the Village Square Note. APP 167 – 193.

4. The Village Square Deed of Trust encumbers certain real property commonly known as 5025 Nellis Oasis Lane, Las Vegas, Nevada (the "Village Square Property"). APP 188.

5. The Village Square Property includes an apartment complex known as the "Village Square Apartments." *Id.*

B. The Liberty Village Loan.

6. On November 2, 2017, Respondent Westland Liberty Village LLC's ("Liberty Village") (together with Village Square, "Westland" or "Respondents") predecessor-in-interest, Shamrock Properties VI LLC, a Delaware limited liability

company ("Shamrock VI") and SunTrust executed a *Multifamily Loan and Security Agreement* ("Liberty Village Loan Agreement") setting forth the terms and obligations of the parties with respect to a loan in the amount of $29,000,000.00. APP 221 – 410.

7. On November 2, 2017, Shamrock VI executed a *Multifamily Note* ("Liberty Village Note") in favor of SunTrust in the original principal amount of $29,000,000.00, together with interest. APP 422 – 427.

8. On November 2, 2017, Shamrock VI entered into a *Multifamily Deed of Trust, Assignment of Leases and Rents, Security Agreement and Fixture Filing* ("Liberty Village Deed of Trust," and together with Liberty Village Loan Agreement and Liberty Village Note, the "Liberty Village Loan Documents") (together with the Village Square Loan Documents, the "Loan Documents") to secure, among other things, repayment of the indebtedness under the Liberty Village Note. APP 429 – 456.

9. The Liberty Village Deed of Trust encumbers real property commonly known as 4807 Nellis Oasis Lane, Las Vegas, Nevada 89115 (the "Liberty Village Property") (together with the Village Square Property, the "Properties").APP 451.

10. The Liberty Village Property includes an apartment complex known as the "Liberty Village Apartments"). *Id.*

C. The Assignments To Fannie Mae.

11. On November 2, 2017, SunTrust assigned its rights under the Village Square Loan Documents to Appellant Federal National Mortgage Company, a federally chartered corporation ("Fannie Mae"), but retained the servicing rights and obligations as set forth therein. APP 195 – 198.

12. On November 2, 2017, SunTrust assigned its rights under the Liberty Village Loan Documents to Fannie Mae but retained the servicing rights and obligations as set forth therein. APP 458 – 461.

D. The Assumptions By Westland.

13. On August 29, 2018, Village Square executed an *Assumption and Release Agreement* wherein Village Square assumed all of the obligations of Shamrock VII under the Village Square Loan Documents. APP 200 – 219.

14. On August 29, 2018, Liberty Village executed an *Assumption and Release Agreement* wherein Liberty Village assumed all of the obligations of Shamrock VI under the Liberty Village Loan Documents. APP 463 – 482.

15. In July 2019, following Westland's assumption of the Loan Documents, occupancy rates at the Properties plummeted and Fannie Mae requested an inspection of the Properties. APP 1447.

16. Following the inspections of the Properties, Fannie Mae determined property condition assessments ("PCAs") were necessary to determine the extent of the Properties' deterioration. APP 1447.

17. On or around September 2019, PCAs were issued that established the need for immediate repairs totaling $2,845,980 ($1,092,835 for Village Square and $1,753,145 for Liberty Village). APP 1447 – 1448.

18. In September 2019, Westland's repair escrow accounts contained substantially less than these amounts. APP 1448.

19. On October 18, 2019, SunTrust delivered the PCAs and a *Notice of Demand* with respect to each of the Properties outlining Westland's obligations to make repairs and deposit the amount of immediate repairs into certain repair and replacement accounts within (30) days as required by the Loan Documents. APP 1255 – 1268.

20. The Notices of Demand also advised that the Monthly Replacement Reserve Deposit for Liberty Village was being increased by $8,160 per month and the same for Village Square was being increased by $1,397.42 per month, effective December 1, 2019. APP 1257, 1264.

21. Westland did not fund the repair and replacement accounts as demanded or make adequate repairs. APP 1448.

22. The Loan Documents make "any failure by Borrower to pay or deposit when due any amount required" by the Loan Documents an automatic event of default. APP 92 – 93, 296 – 297.

23. On July 14, 2020, after Westland failed to fund the repair and replacement escrow accounts as required or make adequate repairs, Fannie Mae initiated foreclosure proceedings with respect to each of the Properties. APP 1284 – 1286, 1288 – 1290.

24. At the time of the assumptions, SunTrust was the servicer under the terms of the Loan Documents. APP 201, 484.

25. Grandbridge is now the servicer under the terms of the Village Square Loan Documents and the Liberty Village Loan Documents. APP 1347.

E. Relevant Procedural History Concerning The District Court's Improper Entry Of The Order Against Grandbridge.

26. On August 12, 2020, Fannie Mae filed a *Verified Complaint* against Westland alleging two claims for relief: specific performance for the appointment of a receiver, and a petition for the appointment of a receiver. APP 1 - 13.

27. Fannie Mae concurrently filed a motion for appointment of a receiver on an order shortening time (the "Motion"). APP 1419.

28. On August 31, 2020, Westland filed an Answer, Counterclaim and Third-Party Complaint (the "Answer, Counterclaim and Third-Party Complaint"). APP 1326 – 1403.

29. The Answer, Counterclaim and Third-Party Complaint alleged ten claims for relief against Grandbridge as a third-party defendant. APP 1387 – 1403.

30. In connection with the filing of the Answer, Counterclaim and Third-Party Complaint, Westland filed an opposition to Fannie Mae's Motion and a countermotion for injunctive relief ("Countermotion"). APP 1291 – 1325.

31. On September 15, 2020, Westland served its Answer, Counterclaim and Third-Party Complaint on Grandbridge. APP 1449 – 1454.

32. Crucial to this appeal, ***Grandbridge was not served with Westland's Countermotion nor Westland's September 18, 2020 reply in support of the same.*** APP 1449 – 1454.

33. On October 13, 2020, the hearing was held on Fannie Mae's Motion and Westland's Countermotion. APP 1455 – 1507.

34. Grandbridge did not appear at the October 13, 2020 hearing. APP 1455.

35. On October 13, 2020, the district court denied Fannie Mae's Motion and granted Westland's Countermotion, neither of which from the briefing or the district court's ruling implicated Grandbridge. APP 1503 – 1504.

36. At the October 13, 2020 hearing, the district court specifically ruled:

> [H]ere is my ruling on the Plaintiff's Motion for Appointment of Receiver***. I feel there is a factual dispute on whether there is a default by defendant in this case, so there is no mandatory statute that says I must report -- appoint a receiver, as I feel there is a dispute, a factual dispute whether there is or is not a default.*** When I go to the other cases where I can use my discretion, I have to find that the properties

> would be in danger of being lost or suffer irreparable harm. And I -- based on all the facts that I've reviewed, including the argument, I do not feel that these properties are -- fit the criteria, the factual, to have a receiver appointed under that and I am not going to appoint a receiver. I'm denying it.
>
> ***As far as the Defendants' Countermotion for a Preliminary Injunction Regarding the Notice of the Foreclosure***, I applied the 65 standard as well as the NRS -- what's the other one? I always -- 33.010 standard. I do find that, at this point, there is irreparable harm and that standard is met because it is property. I also find that there is a reasonable probability of success on the merits as far as what -- there's a question of fact as to whether there was a default, etcetera. So, ***I do not want the default to go forward.*** So, I am granting the Countermotion by plaintiffs for the preliminary injunction under NRS 65, NRS 33.010.

APP 1503 - 1504 (emphasis added).

37. The district court further clarified that the injunction would simply prohibit Fannie Mae from advancing the foreclosure sales:

> THE COURT: Okay. I want to stop -- I'm stopping Fannie Mae from going forward with anything based on that Notice of Default.
>
> MR. OLSON: Your Honor, what I was going to suggest, and I've heard your ruling, is right now Fannie Mae is at the stage where it can record a Notice of Sale. Fannie Mae has not done so and I was inquiring whether Your Honor would just simply order that Fannie Mae is prohibited at this time from recording the Notice of Sale.
>
> THE COURT: Yes. Because that would –
>
> MR. OLSON: Thank you.
>
> THE COURT: -- flow, Mr. Olson, from my reasoning. And I thank you for helping me with that, with all the things I'm going through.

APP 1505.

38. On October 19, 2020, Grandbridge filed its answer to Westland's Answer, Counterclaim and Third-Party Complaint. APP 1508 – 1555.

39. On November 24, 2020, the district court entered the Order. APP 1569 - 1584.

40. The draft submitted by Westland and adopted by the district court greatly expanded the scope of the district court's ruling announced at the October 13, 2020 hearing and went far beyond the written briefing on both the Motion and Countermotion. APP 1569 - 1584.

41. The Order makes improper findings of fact with respect to Grandbridge, thinly disguised as findings of fact with respect to Fannie Mae, such as:

a. "Fannie Mae admits that its servicer, [Grandbridge] forwarded a Notice of Demand, dated October 18, 2019, on its behalf that sought a combined $2.85 million additional reserve deposit from Westland for the Liberty Village Property and Village Square Property, which necessarily was based on a modification of the reserve amounts listed in the loan agreements;" (APP 1574)[2] and

b. "By relying on the Notice of Demand, Fannie Mae admits that Grandbridge transferred all funds it held on Westland's behalf for each Property from the interest bearing Replacement Reserve account to the non-interest bearing Repair Reserve account." APP 1575.

[2] This is incorrect. The Notice of Demand is on SunTrust letterhead. APP 1256 - 1258.

42. The Order contains extensive mandatory provisions directed to Fannie Mae and its servicer, Grandbridge, which is included within the definition of "Enjoined Parties" in the Order. APP 1578.

43. The Order contains mandatory injunction provisions that were never briefed, never argued, and were not included within the district court's oral pronouncement of the ruling, including, among other things:

a. Requirements that Fannie Mae and Grandbridge turn over to Westland "monthly debt service invoices" (APP 1579);

b. Requirements that Fannie Mae and Grandbridge turn over to Westland "funds paid in excess of the non-default monthly debt service payments" (APP 1580); and

c. Requirements that Fannie Mae and Grandbridge turn over to Westland "any funds currently held or initially held in the Restoration Reserve Account, which funds were earmarked for the repair of the fire-damaged buildings, Buildings 3426 and 3517." APP 1580.

44. The Order also specifically imposes obligations on Grandbridge concerning how loan payments must be processed, including:

a. Requiring Grandbridge to "return to the ordinary practice of auto-debiting Westland's account for the amount of the non-default normal monthly debt service payment each month;"

b. Dictating in which account funds must be held, the "interest bearing Replacement Reserve Account" or the "non-interest bearing Repair Reserve Account;"

c. Requiring Grandbridge "to credit the Replacement Reserve Account for the interest that Westland would have earned;" and

d. Requiring Grandbridge "to disburse funds held in the Repair Reserve and Replacement Reserve escrow accounts in response to requests submitted consistent with the terms of the loan agreements." APP 1579 – 1580.

VI. SUMMARY OF THE ARGUMENT

The district court erred by entering the Order against Grandbridge, a named third-party defendant and specifically enjoined party, without affording Grandbridge the protections codified in NRCP 65(a)(1). By the time of the hearing on October 13, 2020, Grandbridge had not been served with the Motion or the Countermotion and had not yet appeared in the case. The rules state that an injunction should only be entered after notice to the adverse party. Without the required service, the Order should not run against Grandbridge.

Moreover, Grandbridge's due process rights were violated by the entry of the Order against it as a named enjoined party without the opportunity to be heard. If the proper procedure would have been employed, Grandbridge would have been assured a full opportunity of notice and a chance to be heard before being subjected to an

injunction as onerous and overreaching as the Order. The failure to abide by the proper procedure resulted in a deprivation of Grandbridge's due process rights.

The provisions of NRCP 65(d) that permit an injunction to bind affiliates of enjoined parties are inapplicable to these facts. Grandbridge is not an intermediary through which the terms of the injunction could be side-stepped. Even though Grandbridge did not receive service of the documents leading up to the hearing, Grandbridge is nevertheless a named third-party defendant entitled to notice under NRCP 65(a)(1). NRCP 65(d) is focused on preventing the use of non-parties to do that which the injunction prevents. This is a case of a party subjected to an injunction without evidence of service and a chance to argue its position at the hearing, not a non-party aiding and abetting in the violation of the terms of an injunction.

Finally, injunctions are about preserving the *status quo*. The injunction entered in this case contains provisions that far exceed the preservation of the *status quo*. The Order requires specific actions by Grandbridge to be undertaken on, at minimum, a monthly basis for the indefinite future. Even had Grandbridge received service of the Countermotion prior to the hearing, it would not have had any chance to respond to the provisions that Westland ultimately packed into the Order. For example, the Countermotion focused on the loss of the Properties through foreclosure sales as the basis for the required irreparable harm warranting injunctive relief. APP 1314. Grandbridge thus had no notice of the extent and magnitude of

the mandatory injunction provisions that would ultimately be put into the Order, let alone an opportunity to be heard.

VII. STANDARD OF REVIEW

The determination of whether to grant or deny a preliminary injunction is within the sound discretion of the district court. *S.O.C., Inc. v. The Mirage Casino-Hotel*, 117 Nev. 403, 407, 23 P.3d 243, 246 (2001). Upon appeal, this Court reviews preliminary injunctions for abuse of discretion. *Id.* ("This court's review is limited to the record to determine whether the lower court exceeded the permissible bounds of discretion."). Questions of law are reviewed *de novo*. *Labor Comm'r of State of Nev. v. Littlefield*, 123 Nev. 35, 39, 153 P.3d 26, 28 (2007).

VIII. LEGAL ARGUMENT

A. Grandbridge Was Not Served With The Countermotion Or Reply, And Therefore, The Order Is Void.

1. The notice requirement in NRCP 65(a)(1) is mandatory.

Under NRCP 65(a), the notice requirement is mandatory before a preliminary injunction can be issued. *See* NRCP 65(a)(1) ("No preliminary injunction shall be issued without notice to the adverse party."). Eighth Judicial District Court Rule ("EJDCR") 2.10(a) further provides that a "motion for a preliminary injunction must be made upon the notice required by Rule 2.20, unless an order fixes a shorter notice." EJDCR 2.10(c) states that "all pleadings, affidavits and briefs in support of the restraining order and the motion for preliminary injunction must be served upon

the adverse party…"). Under the timeline described herein, Grandbridge was not served with the Countermotion or any other motion to which it could have lodged an opposition.

Interpreting the federal counterpart to NRCP 65(a)(1), the United States District Court for the District of Nevada observed that the notice requirement in the rule "'necessarily requires that the party opposing the preliminary injunction has the opportunity to be heard and to present evidence. . . . Moreover, compliance with Rule 65(a)(1) is mandatory.'" *See List Indus. v. List*, 2017 WL 3749593, *12 (D. Nev. Aug. 30, 2017). This Court has long found cases interpreting analogous federal rules provide persuasive authority. *See, e.g., Yount v. Criswell Radovan, LLC*, 136 Nev. Adv. Rep. 47, 469 P.3d 167, 172 (2020).

The United States Supreme Court described the purpose of the notice requirement in the rule. "The notice required by Rule 65(a) before a preliminary injunction can issue implies a hearing in which the defendant is given a fair opportunity to oppose the application and to prepare for such opposition." *Granny Goose Foods, Inc. v. Brotherhood of Teamsters and Auto Truck Drivers Local No. 70 of Alameda County*, 415 U.S. 423, 433 n.7 (1974). "One basic principle built into Rule 65 is that those against whom an injunction is issued should receive fair and precisely drawn notice of what the injunction actually prohibits." *Union Pac. R.R.*

Co. v. Mower, 219 F.3d 1069, 1077 (9th Cir. 2000) (citations and internal quotation marks omitted).

Grandbridge was not served with the Countermotion and had no opportunity to oppose it or prepare for such opposition prior to the hearing and the district court's oral ruling from the bench. No compliance with NRCP 65(a)(1) means that the Order should not have been entered against Grandbridge.

2. Entry of the Order against Grandbridge violated its due process rights.

At the time of the hearing on October 13, 2020, Grandbridge had not yet appeared in the case or received service of the Countermotion. Entry of the Order with provisions directed to and which bind Grandbridge violate its due process rights of notice and an opportunity to be heard. *See Eureka County v. Seventh Judicial Dist. Court*, 134 Nev. 275, 279-281, 417 P.3d 1121, 1124-26 (2018). "The fundamental requisite of due process is the opportunity to be heard." *See Browning v. Dixon*, 114 Nev. 213, 217, 954 P.2d 741, 743 (1998).

"This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Browning*, 114 Nev. at 217, 954 P.2d at 743 (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 647 (1949)). "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the

circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.*

Nevada courts have adhered to the stringent restrictions set forth in the language of NRCP 65(a)(1), which "reflect the fact that our entire jurisprudence runs counter to the notion of court action taken before reasonable notice and an opportunity to be heard has been granted both sides of a dispute." *Granny Goose Foods, Inc.*, 415 U.S. at 438-39; *see also Station Casinos, Inc. v. Murphy*, 2010 U.S. Dist. LEXIS 131260, *5 (D. Nev. Nov. 18, 2010) (quoting *Granny Goose*, 415 U.S. at 438-39). The lack of notice and an opportunity to be heard prior to issuing the Order entering the preliminary injunction against Grandbridge is fatal to the Order. Accordingly, the Order should be reversed.

B. Grandbridge Is Not The Agent Of Or In "Active Concert Or Participation" With Fannie Mae, Rendering NRCP 65(d)(2)(B)-(C) Inapplicable.

This Court considered facts like those at issue in this appeal in *Hospitality Int'l Grp. v. Gratitude Grp., LLC*, 132 Nev. 980, 387 P.3d 208 (2016). In *Hospitality*, some of the defendants were not served until after the hearing on the preliminary injunction. *Hospitality Int'l Grp.,* 132 Nev. 980, 387 P.3d at 209. Those defendants objected that the preliminary injunction was invalid as to the late-served defendants. *Id.* This Court lamented that whether the "injunction order runs against defendants served after the hearing but before its entry presents an issue that the

parties did not adequately brief." *Id.* Here, while not identical to the issue in *Hospitality*, the question of whether an injunction should run against a defendant not served with the papers related to the injunction motion prior to the hearing is briefed as reflected in the arguments related to the notice requirement in NRCP 65(a)(1) and due process set forth above. This Court should determine that the stringent limitation on the entry of a preliminary injunction in NRCP 65(a)(1) and due process concerns render an injunction order void as to adverse parties that do not receive service prior to the hearing of the motion and related pleadings supporting the injunction motion.

NRCP 65(a)(1) must be read in harmony with NRCP 65(d)(2)(B) and (C). *See Albios v. Horizon Cmtys., Inc*., 122 Nev. 409, 418, 132 P.3d 1022, 1028 (2006) ("Whenever possible, this court will interpret a rule or statute in harmony with other rules and statutes.") In *Hospitality*, this Court left undecided the question of whether NRCP 65(a)(1) renders an injunction inapplicable against parties served after the hearing on the injunction. *Hospitality Int'l Grp.,* 132 Nev. 980, 387 P.3d at 209 ("We do not need to reach it to resolve this appeal…"). This Court relied on NRCP 65(d)(2)(B) and (C) and the "significant exception" to the "rule requiring *in personam* jurisdiction over the party enjoined" to resolve that appeal. *Id*. This Court looked to the "interrelationship" between the originally served and later-served defendants and the actual notice of the proceedings before and after the entry of the

injunction order at issue in that case to decide that delay in service was not fatal to the order. *Id.*

This Court cited to Wright & Miller, and the description of the "significant exception" encapsulated in the federal counterpart to NRCP 65(d), which "involves nonparties who have actual notice of an injunction and are guilty of aiding or abetting or acting in concert with a named defendant or the defendant's privy in violating the injunction." *Id.* The limitations in the language of NRCP 65(d)(2)(B) and (C) were summarized by the United States Supreme Court in connection with the federal rule as follows:

> This [rule] is derived from the common law doctrine that a decree of injunction not only binds the parties defendant but also those identified with them in interest, in "privity" with them, represented by them or subject to their control. In essence it is that defendants may not nullify a decree by carrying out prohibited acts through aiders and abettors, although they were not parties to the original proceeding.

See Regal Knitwear Co. v. NLRB, 324 U.S. 9, 14 (1945). Thus, "[a]n injunction binds a non-party only if it has actual notice and either 'abets the enjoined party' in violating the injunction or is 'legally identified' with the enjoined party." *CFPB v. Howard Law, P.C.*, 671 F. App'x 954, 955 (9th Cir. 2016) (citing *United States v. Baker*, 641 F.2d 1311, 1313 (9th Cir. 1981), and *NLRB v. Sequoia Dist. Council of Carpenters, AFL-CIO,* 568 F.2d 628, 633 (9th Cir. 1977)); *see also Saga Int'l, Inc. v. John D. Brush & Co.*, 984 F. Supp. 1283, 1286 (C.D. Cal. 1997) ("An injunction

applies only to a party, those who aid and abet a party, and those in privity with a party.").

Grandbridge is an enjoined party, not a non-party that can be legally identified with an enjoined party. This appeal does not present the question of whether a third party not named in the injunction should be bound by the terms of the order based on its relationship with the named enjoined party. *See, e.g., Regal Knitwear Co.,* 324 U.S. at 15. As such, NRCP 65(d)(2)(B) and (C) do not justify or support the entry of the Order against Grandbridge.

In *Hospitality*, this Court reasoned that the "interrelationship between the originally served defendants and later-served defendants" meant that the delay in service on some of the named defendants did not invalidate the order. *Hospitality Int'l Grp.,* 132 Nev. 980, 387 P.3d at 209. This Court did not expound on the "interrelationship," but the record reflects that the originally served defendants and the later-served defendants were jointly represented on appeal. *Id.* This case is different than *Hospitality*.

First, this Court did not address a due process objection in *Hospitality*, while this matter places a due process objection squarely at issue.

Second, there is no "interrelationship" between Fannie Mae, which appeared at the October 13, 2020 hearing, and Grandbridge, which was not served with the Motion and Countermotion and did not appear in the case until October 19, 2020,

sufficient to satisfy the protections in NRCP 65(a)(1). Fannie Mae and Grandbridge are each separate and independent parties, do not share ownership, and are not "interrelated" in the way that this Court found persuasive in *Hospitality.*

Third, Grandbridge does not fit within any of the categories identified in NRCP 65(d)(2)(B). Grandbridge is not the agent of Fannie Mae.

Fourth, Grandbridge does not aid or abet Fannie Mae in the violation of Order. In considering whether a non-party engaged in "active concert and participation" for purposes of Rule 65(d), the Court must conduct "[a] fact-sensitive inquiry . . . to determine whether persons not named in an injunction can be bound by its terms because they are acting in concert with an enjoined party." *In re Zyprexa Litig*., 474 F. Supp. 2d 385, 419 (E.D.N.Y. 2007). NRCP 65(d)(2)(C) is not applicable to this case, as Grandbridge is a named enjoined party. Moreover, no fact-sensitive inquiry regarding Grandbridge's actions occurred prior to the entry of the Order.

NRCP 65(d)(2)(B) and (C) are directed to non-parties that aid or abet the enjoined party in violating the injunction or are legally identified with the enjoined party. *CFPB v. Howard Law, P.C.*, 671 F. App'x 954, 955 (9th Cir. 2016). Those rules should be not be used to avoid the notice protections afforded by NRCP 65(a) and to bind a named defendant and specifically enjoined party to an injunction. The "significant exception" identified by this Court in *Hospitality* should not be wielded

offensively to deprive Grandbridge of its right to service and its due process right to be heard prior to entry of an order subjecting it to an injunction.

C. The Order Should Be Modified To Remove The Mandatory Provisions Directed To Grandbridge.

A preliminary injunction can take two forms – prohibitory or mandatory. *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co*., 571 F.3d 873, 878–79 (9th Cir. 2009). A prohibitory injunction – the most common type – prohibits a party from acting and "merely freezes the positions of the parties until the court can hear the case on the merits." *Heckler v. Lopez*, 463 U.S. 1328, 1333 (1983).

Injunctions are issued to preserve the *status quo* while litigation on the merits continues in the normal course. *See, e.g., Pickett v. Comanche Constr*., 108 Nev. 422, 426, 836 P.2d 42 (1992). Even mandatory injunctions are used to restore the *status quo*. *See, e.g., Leonard v. Stoebling*, 102 Nev. 543, 550-51, 728 P.2d 1358, 1363 (1986) ("Mandatory injunctions are used to restore the *status quo*, to undo wrongful conditions."). But the *status quo* is not the focus of the Order. The Order compels Grandbridge to take action that goes above and beyond the preservation of the *status quo*. *See, e.g.,* APP 1579 - 1580.

The Order at issue in this appeal goes beyond maintaining the *status quo* and "orders a responsible party to take action." *Garcia v. Google, Inc*., 786 F.3d 733, 740 (9th Cir. 2015); *Dodge Bros. v. Gen. Petroleum Corp. of Nevada*, 54 Nev. 245, 10 P.2d 341, 342 (1932) (recognizing that a "mandatory injunction" is one that

requires an individual to do a particular act, such as compel performance of a contract); *Meghrig v. KFC W., Inc*., 516 U.S. 479, 484 (1996) (holding that a mandatory injunction "orders a responsible party to 'take action.'").

Mandatory injunctions are "particularly disfavored." *Garcia*, 786 F.3d at 740. Mandatory injunctive relief has a higher burden and should be denied "unless the facts and law clearly favor the moving party." *Id*.; *Leonard v. Stoebling*, 102 Nev. 543, 551, 728 P.2d 1358, 1363 (1986) ("A court should exercise restraint and caution in providing this type of equitable relief."). "[M]andatory injunctions have been sanctioned in the recent past to accomplish the restoration of the *status quo* …". *Id.*

The hearing on October 13, 2020 was about whether Fannie Mae could proceed with foreclosure sales on the Properties. APP 1503 - 1504. The district court specifically noted that it was a question of fact whether a default had occurred, but in no way determined the opposite, that a default had not occurred. APP 1466 – 1467, 1491 - 1492, 1503 - 1504. The district court left this issue for further development during discovery. APP 1470. There was no discussion in the papers, at the hearing, or by the district court regarding the elevated standard for mandatory injunctions, and no conclusions of law were issued by the district court addressing this standard. APP 1503 – 1504. In one exchange, the district court inquired:

> THE COURT: And that segues into your Countermotion for the TRO where, basically, it would be a preliminary injunction, at this point. Correct? To stop their default proceedings. Correct?

MR. BENEDICT: It would be. Yes, Your Honor. It does.

APP 1483.

Accordingly, the Order should be modified by limiting it to preventing the continuance of the foreclosure sales against the Properties and to remove the mandatory provisions aimed at compelling action by Grandbridge.

D. Joinder To Fannie Mae's Opening Brief.

Grandbridge joins in the legal arguments set forth in Fannie Mae's Opening Brief filed herein.

CONCLUSION

The district court erred by entering the Order against Grandbridge as a named defendant and specifically enjoined party without affording Grandbridge the protection of service and an opportunity to be heard. Grandbridge should be relieved of the multitude of mandatory provisions requiring specific action by Grandbridge on an on-going basis. The breadth of the language included in the Order exceeded the briefing and the scope of the district court's ruling announced at the hearing on October 13, 2020.

This Court should modify the Order to remove Grandbridge as an enjoined party and to simply prohibit the continuation of foreclosure proceedings on the Properties.

DATED this 22nd day of June, 2021.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[**X**] This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

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2. I further certify that this brief complies with page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

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3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable

Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript of appendix where the matter relief on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 22nd day of June 2021.

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CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On June 22, 2021, I caused to be served a true and correct copy of the foregoing **APPELLANT'S OPENING BRIEF** to the following by the method indicated:

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